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No. 04-522

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In the Supreme Court of the United States

UNITEDHEALTH GROUP, INC., *et al.*,

Petitioners,

v.

LEONARD J. KLAY, M.D., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries, the Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation. The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber's members are frequently the target of class action litigation. Although class actions can be useful devices, they are readily prone to abuses that pose significant risks to the business community and to the nation's economy. Class certification greatly increases the burdens of litigation, including the risk of an adverse verdict, and thus often forces defendants to settle cases even if they lack merit. Such settlements – aptly described by Judge Friendly's term "blackmail settlements" – distort the legal system and cause substantial economic harm. Settlements coerced by questionable or erroneous certification decisions impose substantial costs on businesses that are often passed on to consumers; they deter innovation; and they cause inefficiency in the capital markets. Application of the proper standards for class certification under Rule 23 of the Federal Rules of Civil Procedure is an issue of surpassing importance to the Chamber and its members. *Amicus* has extensive experience litigating these issues and is well situated

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[1] The parties' letters of consent to this filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, the Chamber states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

to brief this Court on their importance, which extends well beyond the immediate concerns of the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[C]lass actions are without doubt the most controversial subject in the civil process today." Bruce Hay & David Rosenberg, "*Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377 (2000). Much of the controversy centers on class certification, which can transform a modest set of individual claims into a gargantuan lawsuit that threatens an entire company (or, as in this case, an entire industry) with ruinous financial liability. From a defendant's perspective, certification dramatically increases both the costs of litigation and the costs of an adverse verdict. It also increases the *likelihood* of an adverse verdict, because class actions create additional procedural burdens for defendants that make such cases more difficult to defend.

For these reasons, judges and academic commentators have recognized that class certification "places inordinate or hydraulic pressure on defendants to settle." *Newton* v. *Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001); see also Robert Bone & David Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1292 (2002) ("[A]lmost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision."). The settlement pressures created by certification decisions apply even for claims that lack merit. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("[C]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and abandon a meritorious defense.").

Against this backdrop, few legal questions are of greater concern to the business community than the one presented in this case: whether a federal court is required, before certifying a class action, to conduct a rigorous analysis that goes beyond the bare allegations of the complaint, in order to determine

whether the class certification is *in fact* appropriate under the standards of Rule 23. That issue recurs in case after case; indeed, the persistent and deepening circuit split regarding the standard imposed by Rule 23 of the Federal Rules of Civil Procedure is a continuing source of frustration and dismay for class action defendants. The division in the lower courts springs from a misreading of this Court's prior decisions that has generated confusion for decades. The consequences have been forum shopping and abuse of the class action mechanism to coerce lucrative settlements in cases of dubious validity. The present case provides an excellent opportunity to end those abuses and bring much-needed clarity and uniformity to the application of Rule 23.

I. The approach followed by the court of appeals in this case makes class certification all but automatic. It allows plaintiffs to secure certification merely by artfully drafting a complaint, rather than demonstrating to the district court that the prerequisites of Rule 23 actually exist. Such abdication of judicial responsibilities is inconsistent with this Court's instruction that "rigorous analysis" of certification issues is required by Rule 23, but many courts have mistakenly concluded that the analysis must be based on plaintiffs' *allegations*, rather than judicial *findings*, because of this Court's admonition that class certification decisions should not be based on a preliminary examination of the merits. Many of the worst abuses in contemporary class action litigation arise because Rule 23 is treated merely as a pleading requirement.

II. Class certification fundamentally changes the nature of a case and gives plaintiffs enormous leverage over defendants. Certifying a class without looking beyond the allegations of the complaint leads to erroneous certification decisions that greatly benefit class counsel at the expense of defendants and absent class members. Such a cavalier approach confers the benefits of class certification without meaningful judicial scrutiny of even the most outlandish and implausible allegations. It encourages vexatious class action litigation that burdens the

judicial system and imposes substantial economic costs on defendants – all to the ultimate detriment of U.S. companies and consumers.

III. The petition should be granted, even though it seeks interlocutory relief. In authorizing interlocutory appellate review of certification decisions, FED. R. CIV. P. 23(f) recognizes that class certification by a district court fundamentally alters the nature of a case and greatly reduces the likelihood of a final, appealable judgment. Without interlocutory review, certification decisions of the sort made in this case are likely to escape this Court's review altogether.

The Court should take this opportunity to make clear that certification decisions require an analytic rigor commensurate with their effects on the parties to a particular case and on the legal system more generally. The issue is too important – and the costs of getting it wrong too great – to allow this widening circuit split to linger any longer.

ARGUMENT

The proper application of Rule 23's requirements for class certification is an issue of unarguable significance that arises in nearly every case filed as a class action. This Court has yet to address the issue squarely, but has instead allowed an increasingly deep and obvious circuit split to develop. Because that split is effectively described in the petition, *amicus* will concentrate on the very real – and very serious – consequences of the split; why the approach taken by the Eleventh Circuit (and those other courts in whose wake it traveled) is so profoundly misguided; and why it is immediately imperative for this Court to address these problems and ensure national uniformity in the application of Rule 23.

I. CERTIFYING A CLASS BASED ONLY ON THE PLAINTIFFS' ALLEGATIONS "HAS NOTHING TO RECOMMEND IT" AND LEADS TO ERRONEOUS CLASS CERTIFICATIONS

The court of appeals in this case affirmed class certification – including the critical "finding" that common issues would predominate over individual issues – based on nothing more than plaintiffs' *allegations*. The Eleventh Circuit ignored the extensive evidence in the record that the defendants' representations to the members of the purported class were not uniform and that the nature and that the extent of reliance (if any) on those representations varied considerably among class members.[2] Rule 23 does not require this evidence to be believed, but

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[2] As the petition for a writ of certiorari accurately observes, two distinct circuit splits have developed – one concerning whether the court conducting a Rule 23 inquiry should accept the plaintiffs' allegations as true, the other concerning the ability to find that the predominance requirement is met when each plaintiff's case depends on a showing of reliance – that are both implicated by the decision below. On the second question, the court of appeals expressly rejected the Fifth Circuit's holding in *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) that "a fraud class action cannot be certified when individual reliance will be an issue." *Castano* recognizes, correctly in the Chamber's view, that class certification is almost invariably inappropriate when plaintiffs must prove reliance individually. The Eleventh Circuit disagreed, however, holding that individual reliance was no barrier to certification. Pet. App. 62a-64a. Because this important conflict is worthy of the Court's attention, the Chamber fully supports a grant of certiorari on both questions presented. The Chamber devotes this brief entirely (other than this footnote) to the first question presented, however, because "[t]he court of appeals's refusal to recognize that individual issues always predominate in a fraud case in which reliance is disputed *is a product of* its failure to look beyond the plaintiffs' allegations and apply the rigorous analysis that Rule 23 requires." Pet. 25 (emphasis added). That is, the Eleventh Circuit gave the wrong answer to the second question presented – relaxing the requirement for proving reliance and suggesting that plain-

it does require the evidence to be *considered*. The court of appeals, however, affirmed the class certification based only on an inquiry into whether the allegations in the complaint supported the requisite "predominance" finding. This cramped analysis permitted a class certification based on generalized characterizations of the defendants' representations and plaintiffs' reliance – for example, that defendants promised to "honestly pay physicians the amounts to which they were entitled," Pet. App. 62a – rather than a careful analysis of whether, *in fact*, common issues would predominate in the case.

In so doing, the court of appeals aligned itself with a minority of circuits that have held that, "when deciding a motion for class certification, the district court should accept the allegations contained in the complaint as true." *J.B. ex rel. Hart* v. *Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir.1997). As the Seventh Circuit has observed, however, that approach "cannot be found in Rule 23 and has nothing to recommend it." *Szabo* v. *Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). Indeed, relying solely on the plaintiffs' allegations bespeaks a fundamental misunderstanding both of Rule 23 and of class certification, one that poses severe consequences for defendants, for absent class members, and for the legal system generally.

The problems with this approach begin with the text of Rule 23, which mandates that a class may be certified only if the district court "*finds* that questions of law or fact common to the members of the class predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3) (emphasis added). Deference to bare allegations, particularly when those allegations gloss over critical facts that undermine commonality or when the allegations are contradicted by evidence in the record, cannot substitute for the "findings" required by the rule.

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tiffs could satisfy that element by means of "common evidence" (Pet. App. 64a) – precisely because it had already given the wrong answer to the first question.

See *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004).

This is confirmed by the 2003 Amendment to Rule 23(c)(1)(A), which directed that class certification be resolved "at an early practicable time" rather than "as soon as practicable," as the earlier version of the rule required. The rule was amended in recognition of the fact that it is often "appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis." FED. R. CIV. P. 23 advisory committee's notes. This provision makes clear that class certification should rest on facts, not mere allegations; it requires careful analysis of the actual circumstances of the case, rather than a cursory reading of the complaint. To make the necessary findings, in other words, requires active engagement with the evidence and the legal issues in the case to determine whether the claims can indeed be fairly and effectively tried on a classwide basis. When that determination cannot be reached solely on the basis of the complaint, as is almost invariably the case, the court must engage in fact-finding based on evidence presented by the parties.

This much should have been clear from *General Telephone Company of the Southwest* v. *Falcon*, 457 U.S. 147 (1982). In *Falcon*, an employment discrimination case, the Court affirmed the reversal of a certification decision, faulting the district court for failing to "evaluate carefully the legitimacy of the named plaintiff's plea" that he was a proper class representative under Rule 23(a). *Id.* at 160. Emphasizing that "actual, not presumed, conformance with Rule 23(a) remains indispensable," the Court specifically observed that it will often be "necessary for the [district] court to probe behind the pleadings before coming to rest on the certification question." *Ibid.* Thus, whereas the Eleventh Circuit's decision here suggests that class certification decisions may merely test the sufficiency of plaintiffs' allegations – akin to a motion under Rule 12(b)(6) – *Falcon* says the contrary. It illustrates that Rule 23 does more than impose a

pleading requirement. The certification procedure described by the rule is instead meant to ensure that defendants and absent class members are not subjected to the potential prejudice that inheres in an improper class certification, by demanding a "rigorous analysis" sufficient to show that the certification is appropriate. *Id.* at 161. As one commentator has aptly observed, "[i]t is hard to imagine how one could conduct a 'rigorous analysis' if evidence related to the merits cannot be considered specifically for the purpose of assessing whether plaintiffs have met the Rule 23 requirements." David S. Evans, *Class Certification, The Merits, And Expert Evidence*, 11 GEO. MASON L. REV. 1, 10 (2002).

The fallacy of the Eleventh Circuit's approach is highlighted by considering what would happen if it were applied in the context of the Rule 23(a) factors. For example, could plaintiffs satisfy the numerosity requirement of Rule 23(a)(1) simply by *alleging* that the putative class was sufficiently large to render joinder impracticable? As the Seventh Circuit has observed, there would be no justification for a district court to defer to such an allegation in the face of evidence that the class had only two members. *Szabo*, 249 F.3d at 676. Similarly, if a defendant put forward evidence that the named plaintiffs had interests adverse to those of the class, see FED. R. CIV. P. 23(a)(4), the district court surely could not certify the class based merely on contrary allegations in the complaint. In order to protect absent class members and the court itself, that issue would have to be squarely confronted and decided – based on the facts as they are, not as plaintiffs wish them to be. And there is simply no reason why the certification procedure should be any different where (as here) the dispute centers on the predominance requirement of Rule 23(b)(3).

The courts that have suggested otherwise have done so largely because of a misreading of *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). *Eisen* involved claims brought by approximately 6 million odd-lot traders on the New York Stock Exchange alleging violations of the antitrust and securi-

ties laws. The district court, concerned about the costs of notifying all prospective class members, conducted a preliminary inquiry into the merits of the suit. After concluding that plaintiffs had a strong case, the judge allocated 90 percent of the notice costs to the defendants. The Second Circuit reversed, and this Court affirmed the Second Circuit. In so doing, the Court observed that a district court should not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* at 177. In context, this statement is perfectly sensible; class certification decisions must turn on whether the elements of Rule 23 are satisfied, not whether the plaintiffs have a strong case on the merits.[3]

Since it was decided, however, *Eisen* has been cited frequently as supporting a rule that allows district courts at the certification stage to ignore any evidence that might bear on the merits – even when considering such evidence is necessary to determine whether the prerequisites of Rule 23 actually exist in a particular case. See Bone & Evans, *supra*, 51 DUKE L.J. at 1266 ("*Eisen* * * * has produced a large body of case law in which lower court judges stop short of making the sort of merits inquiry required for a sound certification analysis."). This approach has led courts to certify classes based on an unquestioning acceptance of the allegations in the plaintiffs' complaint. *E.g.*, *Shelter Realty Corp.* v. *Allied Maintenance Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978). Despite *Falcon*, this misreading of *Eisen* has persisted and has seriously distorted the law of class actions for decades. See Evans, *supra*, 11 GEO. MASON L. REV. at 8-9 ("Many district court have misread *Eisen* as saying that anything that smacks of merits is off limits in

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[3] Indeed, in support of its conclusion, the Court approvingly cited Judge Wisdom: "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen*, 417 U.S. at 178 (quoting *Miller* v. *Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971)).

considering the class issues."). The time has come for the Court to correct that long-standing error.

This distortion of *Eisen* demands correction not merely because it is wrong, but because it is dangerous. It makes class certification far too easy. As the Fourth Circuit has observed, if "it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order." *Gariety*, 368 F.3d at 365. It is difficult to imagine a case in which a well-represented class would not be certified because certification could be secured simply by artful drafting of the complaint.

District courts are supposed to act as guardians of the rights of defendants and absent class members, and as protectors of the interests of the judicial system itself, by making the "findings" required by Rule 23 after performing the "rigorous analysis" required by *Falcon*. But courts that rely solely on plaintiffs' allegations are instead turned into little more than rubber stamps, whose task is merely to ensure that the complaint includes the requisite magic words. This "moves the court's discretion to the plaintiff's attorneys," allowing them to manipulate the certification process to their own ends. *Szabo*, 249 F.3d at 677. As a result, many cases in which class treatment is grossly inappropriate – cases, like this one, in which it is manifest that individual issues predominate over common issues – are nonetheless certified and proceed toward trial as class actions. Defendants, absent class members, and the courts have no meaningful protection against the certification of cases that are unfair and unworkable.

Such an approach is comprehensible only if one views class certification as an insignificant procedural decision that has little substantive effect. It requires a belief that the costs of erroneous certification decisions are negligible and that mistakes are readily corrected. As we next discuss, however, those views are profoundly mistaken.

II. ERRONEOUS CLASS CERTIFICATION CAUSES EXTENSIVE HARM TO DEFENDANTS AND TO ABSENT CLASS MEMBERS

"The class certification order (granting or denying class status) is the most important decision in a class action case: for the plaintiffs, it means the life or death of their pursuit of their claims; for the defendants, it means a very close line between almost zero liability and so much liability that settlement is the only option." Aimee G. Mackay, *Appealability Of Class Certification Orders Under Federal Rule Of Civil Procedure 23(f): Toward A Principles Approach*, 96 NW. U. L. REV. 755, 798 (2002). The reasons for this phenomenon are obvious: "the specter of huge damage awards against defendants in a class action suit and the expense of litigating these large suits in a system without cost-shifting frequently led defendants to settle even marginal cases, with the settlement often including substantial attorneys' fees for the class lawyers." Linda Silberman, *The Vicissitudes of the American Class Action – With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 205 (1999).

"[T]hat defendants would rather settle large class actions than face the risk, even if it be small, of crushing liability from an adverse judgment on the merits is widely recognized." Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000); see also *id.* at 1546 (observing that class certification "has a huge impact on the subsequent course of the litigation"). Two leading commentators summarized "what most class action lawyers know to be true: almost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision." Bone & Evans, *supra*, 51 DUKE L.J. at 1291-1292; see also Laurens Walker, A *Model Plan to Resolve Federal Class Action Cases by Jury Trial*, 88 VA. L. REV. 405, 410 (2002) (noting that most certified class actions settle and that the number of class action jury trials is "only a handful") (citing

ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 362 (2000)).

The immense settlement pressures induced by certification of a large class have been noted by federal judges, including Judge Friendly, who described them as "blackmail settlements." See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (citing HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002) ("[T]he grant of class status can put substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims."); *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.").

It is not merely the size of a potential jury verdict that makes class certification such a powerful engine of settlement. Because of their sheer mass, class actions are likely to be tried in a manner that is ultimately prejudicial to the defendant and that increases the *likelihood* of an adverse result. See *Castano*, 84 F.3d at 746 ("Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards."); see also Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22, 24-25 (1989) (empirical studies showing that, as the number of plaintiffs in a case increases, juries become more likely to find fault and to impose greater damages).

Moreover, as one district judge recently observed, "[o]ne of the interesting side effects of the class action form is that, in some cases, it effectively transfers the burden of proving individual facts from plaintiffs to defendants." *In re Initial Public Offering Secs. Litig.*, 2004 WL 2297401, at *28 n.300

(S.D.N.Y. Oct. 13, 2004). The present case shows this process at work. Here, where reliance is an element of plaintiffs' claims, the certification of a class effectively relieves plaintiffs from the obligation to demonstrate reliance individually. Instead, as the court of appeals suggested, plaintiffs will be able to prove reliance on a classwide basis "through common evidence." App. 64a. If defendants believe that a particular class member did not in fact rely on the alleged misrepresentations, it will now be *defendants'* burden to make that showing as to that particular plaintiff. In a class of this size, the process of trying to rebut, plaintiff-by-plaintiff, the classwide showing of reliance, may simply be overwhelming. This reversal of the ordinary burden makes litigation both more expensive and more risky. It makes settlement far more attractive even if the balance of the evidence favors defendants.

The fact that a certification decision "may be altered or amended before final judgment," FED. R. CIV. P. 23(c)(1)(C), does little to mitigate these risks. In practice, class certifications are rarely modified or undone. See Bone & Evans, *supra*, 51 DUKE L.J. at 1301 ("[I]nitial certification is, as a practical matter, tantamount to final certification for most cases."). A 1995 study found that certification decisions were altered in fewer than two percent of federal cases. See THOMAS E. WILLGING, ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 180, tbl 132 (1996). For that reason, the settlement leverage conferred by a certification order exists from the moment the order is entered. "Once a certification 'order is issued, the parties can be expected to rely on it and * * * engage in settlement discussions on the assumption that in the normal course of events it will not be altered except for good cause.'" *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 152 (2d Cir. 2001) (Jacobs, J., dissenting) (quoting MANUAL FOR COMPLEX LITIGATION § 30.17, at 223). It is thus cold comfort to suggest that defendants will be able to challenge the factual basis of plaintiffs' Rule 23 allegations at trial, for the certification decision itself

renders the chance of a trial remote. Moreover, even if the class is ultimately decertified once the facts become known, the correct result is reached only after a substantial waste of judicial and party resources.

Defendants are not the only group threatened by ill-considered certification decisions. Rule 23 is designed to protect absent members of the purported class, as well as defendants; the rule seeks to ensure that the named plaintiff adequately represents and vindicates the interests of those who are not there. See *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 625 (1997). Those absent plaintiffs will be bound, for better or for worse, by the outcome of the class action:

> If the named plaintiff loses in court, then all of the members of the class have lost and cannot relitigate their claims. Some people who might never even have known about the lawsuit and who certainly never participated in it will suddenly find themselves denied access to the court system, on the theory that they were already represented by the named plaintiffs who litigated the action on their behalf.

John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1420 (2003). The protections that Rule 23 was meant to provide for absent class members are undermined when certification rests only on allegations, rather than true findings. The fate of absent members is hitched to the class representatives without any serious inquiry into whether their interests are actually aligned. This represents an abdication of the district court's responsibility "in a sort of fiduciary capacity," to protect the absentees' fundamental due process rights. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 784 (3d Cir. 1995).

What is ultimately at stake in this case is whether the procedures associated with class certification should be made to correspond with the actual importance of certification decisions. Giving plaintiffs a free pass at the certification stage while reserving the hard questions for trial ignores the fact that, in

modern class action litigation, certification itself is often the crucial event, the decision on which the ultimate outcome of the case will turn. In light of the profound substantive effects that erroneous certification brings, there is simply no justification for conferring the benefits of certification on the named plaintiffs and their attorneys without first requiring them actually to demonstrate that theirs is a case that the governing rules really allow to proceed as a class action. To conclude otherwise, as the Eleventh Circuit did here, undermines the rule of law. See George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 547 (1997); cf. Bronsteen & Fiss, *supra*, 78 NOTRE DAME L. REV. at 1426 (Rule 23 "requires the judge to make a *judgment* before she allows the case to proceed on a class basis") (emphasis added).

And, although other courts have construed Rule 23 to require a more searching analysis (see Pet. 13-15), the liberal venue provisions of the statutes that typically give rise to large-scale federal class actions (RICO and the federal securities laws, in particular) make it easy for plaintiffs to bring cases in those districts that permit certification without looking behind the allegations of the complaint. Cf. *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 339-340 (1980). The opportunities for such forum shopping make it especially urgent for this Court to set a uniform national standard that requires district courts to act as genuine gatekeepers at the class certification stage.

The alterative – leaving the split unresolved and allowing plaintiffs to bring class claims in whatever jurisdictions make certification most likely – is an invitation to frivolous class action litigation, with all of the social and economic harms that such litigation brings. Because settlements induced by class certification are so frequently "divorced from the parties' underlying legal positions," *Hevesi* v. *Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004), an overly deferential certification standard all but encourages plaintiffs to file marginal class action suits. For, even if a claim has little chance of success if tried, it is still likely to extract a lucrative settlement once a class is certified. Plaintiffs can therefore be confident that any

flaws in their allegations will not be exposed until a trial that will probably never come. Cf. *Visa Check*, 280 F.3d at 151 (Jacobs, J., dissenting) ("[I]f the district court later finds that a trial is unmanageable, the named plaintiffs and their counsel lose nothing, but in the meantime they have in hand the means to extract a favorable settlement of what may be weak claims.").

The prospect of a greater volume of questionable class actions litigation threatens severe consequences that extend far beyond any particular case.[4] Meritless class actions are economically inefficient; they "waste[] capital and unfairly transfer[] money from those who have earned it to those who have not." *Ronconi* v. *Larkin*, 253 F.3d 423, 428 (9th Cir. 2001). This increases the costs of doing business in this country, putting U.S. companies at a competitive disadvantage and deterring foreign companies from investing here. See Robert Mednick & Jeffrey Peck, *Proportionality: A Much-Needed Solution to The Accountants' Legal Liability Crisis*, 28 VAL. U. L. REV. 867, 910 (1994) ("Frivolous Rule 10b-5 class action litigation puts American companies on an uphill slope against companies in Japan and Europe that do not face this perpetual burden of litigation."); Michael A. Schneider, *Foreign Listing and the Preeminence of the U.S. Securities Exchanges: Should the SEC Recognize Foreign Accounting Standards?*, 3 MINN. J. GLOBAL TRADE 301, 315-316 (1994) (observing how foreign issuers are often deterred "from raising capital or listing

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[4] Class action litigation is already on the rise. Although statistics are not easy to come by, all empirical data suggest that class actions are playing an increasingly prevalent role in the federal judicial system. See Solimine & Hines, *supra*, 41 WM. & MARY L REV. at 1543 & n.62 ("[I]t appears that parties – mainly plaintiffs – are increasingly seeking to certify such classes."); Mackay, *supra*, 96 NW. U. L. REV. at 755 & n.2. One survey of Fortune 500 companies estimated that, between 1988 and 1998, the number of class actions rose by 338 percent in federal court. *High Flyers*, Editorial, WALL ST. J., June 26, 2000, at A46.

securities in the United States" because they do not want to "subject themselves to * * * U.S. class action suits").

What is more, the fear of liability often causes firms to change the way they do business – often in ways that benefit neither the company nor society. "Companies are deterred from engaging in socially beneficial activities for fear of being targeted. Moreover, high stakes class litigation can threaten to bankrupt a socially valuable firm. And the time spent dealing with frivolous cases harms companies by diverting valuable management resources from more productive uses." Bone & Evans, *supra*, 51 DUKE L.J. at 1302. Indeed, companies frequently "adjust to the threat of liability by doing less. *Not* innovating is a remarkably easy thing to do." PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 155 (1st ed. 1990). And products not pulled from the shelves often become more expensive as businesses pass the costs of litigation on to their customers. In these ways, class actions, typically brought in the name of the American consumer, ironically end up hurting the very constituencies they purport to help.

III. INTERLOCUTORY REVIEW OF A CLASS CERTIFICATION DECISION MAY BE REQUIRED TO ADDRESS THE CIRCUIT SPLIT

The fact that petitioners seek interlocutory relief should be no obstacle to granting the petition. The Court will have few, if any, opportunities to resolve the circuit conflict through the review of a final judgment for the very reason that erroneous class certifications create enormous pressure to settle and rarely culminate in a litigated judgment on the merits. If the circuit split is not resolved through this Court's review of a decision on an interlocutory appeal under Rule 23(f), it will almost certainly linger, causing confusion for litigants and courts alike.[5]

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[5]The petition should be granted, as well, to decide an issue of exceptional importance that will resolve an extraordinarily complex case of overriding importance to a critical industry. "In some instances, the interlocutory status of the case may be no impediment

The court of appeals allowed petitioners to pursue an interlocutory appeal under Rule 23(f) of the Federal Rules of Civil Procedure. That rule, enacted in 1998, gives appellate courts discretion to "permit an appeal from an order of a district court granting or denying class certification." FED. R. CIV. P. 23(f). Such appeals are analogous to the appeals authorized by 28 U.S.C. § 1292(b). See FED. R. CIV. P. 23(f) advisory committee notes. And this Court has certainly not hesitated to review interlocutory judgments made by appellate courts under that provision. See, *e.g.*, *Norfolk Southern Ry.* v. *James N. Kirby, Pty Ltd.*, 125 S. Ct. 385 (2004); *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003) (denial of motion to remand case to state court); *Murphy Bros., Inc.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999) (same); *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (denial of motion for partial summary judgment); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980) (denial of motion to declare an agreement to fix credit terms illegal per se under the Sherman Act). There is no reason not to follow a similar practice under Rule 23(f) with respect to class certification decisions – especially given that the framers of the rule deliberately created a *more favorable* procedure for interlocutory review than that authorized by Section 1292(b). FED. R. CIV. P. 23(f) advisory committee's notes.

The passage of Rule 23(f), which greatly mitigated the effect of this Court's decision in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), represents a considered policy judgment that interlocutory appeals may be needed to prevent the harmful effects of improper class certification. In enacting the rule, the advisory committee recognized that an order granting class certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of poten-

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to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." ROBERT L. STERN, ET AL. SUPREME COURT PRACTICE § 4.18, at 260 (8th ed. 2002).

tially ruinous liability." *Ibid.* When that happens, of course, there is no appealable final judgment and any errors made in the certification decision will go uncorrected.

Rule 23(f) thus highlights the importance of getting certification decisions right "at an early practicable time," FED. R. CIV. P. 23(c)(1)(A), rather than waiting until the end of litigation when it will likely be too late to correct erroneous certification decisions. It recognizes that, if appellate courts wait for a final judgment before deciding important legal questions arising under Rule 23, many of those questions will escape review altogether. See *Hevesi*, 366 F.3d at 80-81. That result not only would work an injustice on parties (defendants or plaintiffs, as the case may be) harmed by erroneous certification decisions, but also would frustrate the consistent development of the law.

Rule 23(f) provides an avenue for appellate review of decisions that would otherwise escape such review, as a matter of practical reality; the rule thereby allows future litigants to benefit from the development and clarification of the law through the appellate process. See *Blair* v. *Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). Such clarification sorely needed here; indeed, the fact that Rule 23(f) was not enacted until 1998 may well be one reason that the fundamental issue presented by this case has not previously been resolved by this Court. And the reasons why interlocutory appeals are fully justified in the intermediate federal appellate courts are likewise reasons why this Court should not hesitate to review an otherwise certworthy decision just because it is interlocutory.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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